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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DAVID H. TERRELL a/k/a/
DANIEL H. FORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the trial court's gift instruction created a conclusive presumption that certain transfers made to the defendant were not gifts in violation of this Court's decision in *Commissioner v. Duberstein?*

2. Whether, in the context of a criminal prosecution for tax evasion brought under the net worth method of proof, the government's failure to include substantial assets in the defendant's opening net worth violates the rule set out by this Court in *Holland* that the government must establish the opening net worth with reasonable certainty as part of its *prima facie* case?

3. Whether in a criminal prosecution for tax evasion brought under the net worth method of proof, the presumption that increases in the defendant's net worth are derived from currently taxable income shifts the burden of proof to the defendant in violation of his constitutional rights where the defendant has a likely source of nontaxable income and the government has failed to negate all known sources of nontaxable income?

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Respondent.

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David H. Terrell petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a) is reported at 754 F.2d 1139 (5th Cir. 1985).

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, 1a) was entered on February 14, 1985. A timely suggestion for rehearing en banc was denied on March 19, 1985 (App.

B, *infra*, 20a). On April 1, 1985, the court of appeals denied petitioner's motion for a stay of mandate to allow petitioner to file a petition for writ of certiorari (App. C, *infra*, 22a). This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

Section 7201 of the Internal Revenue Code, 26 U.S.C. § 7201 (1982) provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Section 102(a) of the Internal Revenue Code, 26 U.S.C. § 102 (1982) provides:

> Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

STATEMENT OF THE CASE

This is a net worth tax evasion case. Petitioner was indicted on four counts of criminal tax evasion for the years 1976 through 1979. The government used the net worth method of proof, designating "love offerings," the offerings received at revival meetings and religious services for the personal support and benefit of petitioner, as the likely source of taxable income. As evidence of willfulness the government relied on petitioner's extensive dealings in cash, his name change, and his reliance on close friends and followers to transact business for him.

In order to establish a *prima facie* case of taxes due and owing under the net worth method, the government must establish a net worth starting point with reasonable certainty, show increases in the defendant's net worth over the indictment period, and establish a likely source of taxable income. *Holland v. United States*, 348 U.S. 121 (1954). In this case, the government computed increases in the defendant's net worth over each of the four indictment years, and after making adjustments for non-deductible expenditures and certain nontaxable transactions, the government claimed that the resulting apparent $200,000 net worth increase over the four year period was due to taxable rather than nontaxable sources.

The petitioner raised two defenses. First, the government failed to include in its opening net worth computation assets which would account for most of the apparent increase in his net worth, including a cash accumulation of $200,000 and a herd of cattle received as a gift in 1974 and valued at $75,600. Second, substantial gift receipts during the indictment period were not included by the government in its net worth calculation.

In keeping with established traditions of fundamentalist evangelical religions in this country, petitioner frequently

received unsolicited gifts from his followers as a visible outpouring of their love and affection for him. These gifts were received at times and places other than religious services and included cash, motor vehicles, cattle, horses, clothing, and other items of property which were given to petitioner personally without restriction as to use, and were intended for his personal enjoyment. Petitioner was instructed by his bookkeeper and his accountant that gifts received from these sources were not taxable, and they were not reflected as income on his tax returns.

To assist the government in its investigation, petitioner provided the government with a so-called "gift book" in which he had recorded those substantial gifts received at Christmas and birthdays unless the donor desired to remain anonymous. Clara Harlan, the petitioner's bookkeeper, testified in the government's case-in-chief, that because of his difficulty in reading and writing, the petitioner had never included all gifts he received in the gift book. The government gave petitioner credit for the gifts contained in this book ($56,000 over the indictment period) but refused to investigate or include other gifts on the ground that the petitioner allegedly made an admission that the gift book contained "substantially all" gifts received by him between 1967 and 1979. Relying on this so-called admission, the government claimed to have satisfied any burden to negate nontaxable sources of income.

Numerous witnesses for the government and for the petitioner insisted that they had given petitioner gifts "voluntarily," out of love and affection for him, and without any strings attached. They insisted that they intended these contributions as "gifts" for the petitioner's personal use, and clearly distinguished them from the "love offerings" given to petitioner as compensation for his services at revival meetings. At the same time, given the religious beliefs of the

petitioner and his followers, many of these witnesses testified to a sense of "moral obligation" or religious "fear" which accompanied their gift-giving. According to their religion, God commanded that his worshipers give of themselves selflessly, and many feared some divine retribution should they fail to make such gifts. No witness testified to a sense of moral obligation, fear, or other compulsion to give to the petitioner personally, as opposed to the church or the petitioner's ministry through "love offering" contributions. The type of "moral obligation" or "fear" to which these witnesses testified was solely religious in nature. History is replete with examples of gifts given to churches and to charity out of "fear" of damnation or a sense of "moral obligation" to contribute to a worthy cause. In no case has this or any other court refused to accept that these were statutory "gifts" because of the presence of motivations which accompany many cases of the most unquestionable charity. *See United States v. Kaiser*, 363 U.S. 299, 304 (1960). Nevertheless, the government asked for and obtained an instruction to the jury which expressly prohibited it from treating as gifts those donations which were given under a sense of "moral obligation," "fear" or "intimidation."

Cross examination of the government's witnesses established unequivocally that the petitioner had substantial assets which were not included in the government's opening net worth calculation. The government's evidence reflected the petitioner owned more than 1600 acres of farm and ranch land during the years 1967 through 1979, and yet failed to account for virtually all of the petitioner's farm and ranch inventory, including a substantial herd of cattle. The petitioner, in his second interview with the government special agent, told the agent that he owned cattle, and reported sales of some cattle in his tax returns for the years 1977 and 1979. In its own investigation, the government

uncovered evidence of additional cattle sales during the indictment period. In spite of these substantial "leads" provided by petitioner himself and through the testimony of his friends and followers, the government refused to include any cattle (save one bull) in its opening net worth calculation. The petitioner's expert witness testified on the basis of evidence adduced at trial that the herd of cattle given to the petitioner was worth $75,600 in 1974. In spite of this substantial omission from the net worth starting point, the court refused to instruct the jury that if it found that the government failed to account for such assets in its net worth computations, it must acquit the defendant, since the government had failed to meet its burden of establishing a *prima facie* case under the net worth method and had failed to establish the net worth starting point with the "reasonable certainty" required by this Court in *Holland v. United States*, 348 U.S. 121, 132 (1954).

The jury returned a verdict finding the petitioner guilty on all four counts of criminal tax evasion. Petitioner appealed to the Fifth Circuit Court of Appeals, alleging, *inter alia*, that the trial court erred in allowing the case to go to the jury since the government had failed to establish a *prima facie* case of taxes due and owing under the net worth method, and that the trial court's erroneous instruction on gifts effectively removed the issue of taxability of the alleged net worth increases from the jury, operating, in effect, as a directed verdict against the defendant. The Fifth Circuit affirmed the trial court's decision and denied petitioner's suggestion for rehearing en banc.

The defendant has filed this petition because the gift instruction shifted the burden of proof to the petitioner in violation of his due process rights under the United States Constitution. Petitioner asks this Court to clarify the government's burden of proof under the net worth method

where that method of proof is based entirely on circumstantial evidence.

REASONS FOR GRANTING THE PETITION

I. THE COURT'S INSTRUCTION ON GIFTS WAS ERRONEOUS AND SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS

The crucial issue in the instant case was whether the amounts reflected in the petitioner's increased net worth came from taxable rather than nontaxable sources. Petitioner based his defense on the claim that his apparent net worth increase over the indictment years came from prior accumulated assets not counted in the opening net worth and from gifts received during the indictment period from his friends and followers.

The court submitted an instruction relating to gifts, which amounted to a directed verdict against the petitioner since it created conclusive presumptions which prevented the jury from considering evidence that the petitioner had received substantial gifts throughout the indictment period which accounted for the apparent increase in his net worth.

The trial court instructed the jury that, in determining whether payments made to the petitioner were nontaxable gifts, they should look at the intent of the parties. After stating that such payments are gifts if they "proceed from a detached and disinterested generosity, out of affection, respect, admiration, charity, or the like impulses," the trial court went on to make the following explicit exclusions from the category of gifts:

> 1. A payment is not a gift if it is made to compensate the defendant for his services. In this connection, you should consider how the defendant made his living.

2. A payment is not a gift if the person making the payment expects to receive anything in return for it. A payment would not be a gift if it was made with the expectation that it would allow the defendant to remain in business.

3. A payment is not a gift to the defendant if it is made with the expectation that it will be used to further the religious or ministerial activities of the defendant.

4. A payment is not a gift if the person making the payment felt he had a duty or obligation to make the payment.

5. A payment is not a gift if the person making the payment did so out of fear or intimidation.

(App. D at 36a-37a). This instruction has no basis in law and is in direct conflict with *Commissioner v. Duberstein*, 363 U.S. 278 (1960).

The court below misperceived the petitioner's objection to the gift instruction, stating that petitioner's sole objection was that the court "instructed the jury that all amounts received by a minister were taxable and that the court refused to instruct the jury on the elements of a non-taxable gift." (App. A at 14a). Rather, petitioner's objection was that the instruction, as given, created conclusive presumptions contrary to law which prevented the jury from considering the evidence in this case on the issue of whether increases in the petitioner's net worth were a result of gifts received from his friends and followers.

In *Commissioner v. Duberstein*, 363 U.S. 278, 285-86 (1960), this Court summarized the guidelines to be used in determining whether a transfer should be treated as a gift:

This Court has indicated that a voluntary executed transfer of his property by one to another, without any consideration or compensation therefor, though a common-law gift, is not necessarily a "gift" within the meaning of the statute. For the Court has shown that the mere absence of a legal or moral obligation to make such a payment does not establish that it is a gift. *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 730, 73 L. Ed 918, 928, 49 S. Ct. 499. And, importantly, if the payment proceeds primarily from "the constraining force of any moral or legal duty," or from "the incentive of anticipated benefit" of an economic nature, *Bogardus v. Commissioner*, 302 U.S. 34, 41, 82 L. Ed 32, 37, 58 S. Ct. 61, it is not a gift. And, conversely, "[w]here the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it." *Robertson v. United States*, 343 U.S. 711, 714, 96 L. Ed 1237, 1240, 72 S. Ct. 994. A gift in the statutory sense, on the other hand, proceeds from a "detached and disinterested generosity," *Commissioner v. Lo Bue*, 351 U.S. 243, 246, 100 L. Ed 1142, 1147, 76 S. Ct. 800; "out of affection, respect, admiration, charity or like impulses." *Robertson v. United States*, supra (343 U.S. at 714). And in this regard, the most critical consideration, as the Court was agreed in the leading case here, is the transferor's "intention." *Bogardus v. Commissioner*, 302 U.S. 34, 43, 82 L. Ed 32, 38, 58 S. Ct. 61.

In *Duberstein* this Court considered and explicitly rejected a set of "maxims of experience" which the government sought to have applied as "tests" for determining whether or not a transfer was a gift, stating that "while the principles urged by the Government may, in nonabsolute form as crystalizations of experience, prove persuasive to the trier of facts in a particular case, *neither they, nor any*

the trier of facts in a particular case, *neither they, nor any more detailed statement than has been made, can be laid down as a matter of law.*" 363 U.S. at 289 (emphasis supplied).

The gift instruction given by the trial court in this case violates both the letter and the spirit of *Duberstein*. The trial court laid down as a matter of law that "a payment is not a gift if" the donor had any of five "motivations" which contributed in any manner to the transfer. The jury was not told that it had a choice of whether or not to apply these rules, nor was the jury instructed that they were presumptions which could be rebutted by other evidence in the case. A reasonable juror easily could have viewed these instructions as mandatory. *Sandstrom v. Montana*, 442 U.S. 510, 515 (1979).

The instructions in this case shifted the burden to the petitioner by creating a conclusive presumption as to one element of the crime. The crime of tax evasion occurs if and only if the taxpayer has unreported taxable income. The government had the burden to prove beyond a reasonable doubt that the increases in the petitioner's net worth were attributable to taxable sources. Petitioner maintained that any increases in his net worth resulted from the receipt of nontaxable gifts. Under the circumstances of this case and in light of the testimony adduced at trial, the gift instruction created a presumption that these receipts were not gifts but taxable income. Thus, the instruction allowed the government to establish the taxability of the increases in the petitioner's net worth by conclusively ruling out the only alternative: that they were nontaxable gifts. This error is of a constitutional dimension. *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The conclusive presumption the jury was instructed to apply permitted the jury to convict petitioner without examining the evidence concerning an element of the crime charged. *Connecticut v. Johnson*, 460 U.S. 73, 88 (1983). Since the taxability of the defendant's net worth increase was an ultimate issue at trial upon which defendant's conviction depended, the erroneous gift instruction served as an unconstitutional theory which may well have been the basis of the defendant's conviction in this case. No court can say beyond a reasonable doubt that these erroneous instructions did not contribute to the verdict. *Connecticut v. Johnson*, 460 U.S. 73, 94-95 (1983) (Burger, J., dissenting). Here the Court must apply the long settled rule that when a case is submitted to the jury on alternative grounds, the unconstitutionality of any of the theories requires that the conviction be set aside. *Stromberg v. California*, 283 U.S. 359, 368 (1931).

II. THE FIFTH CIRCUIT MISAPPLIED AND MISAPPREHENDED THE RULE ESTABLISHED BY THIS COURT IN *HOLLAND V. UNITED STATES* THAT THE GOVERNMENT MUST ESTABLISH THE OPENING NET WORTH WITH REASONABLE CERTAINTY IN ORDER TO ESTABLISH A *PRIMA FACIE* CASE OF TAXES DUE AND OWING UNDER THE NET WORTH METHOD OF PROOF

Petitioner showed at trial that he had assets, including a herd of cattle valued at $75,600, which were not included in the government's opening net worth calculation. The failure to include an asset which is capable of accounting for more than one-third of the entire alleged net worth increase over the four year indictment period is not *de minimis* as a matter of law. Thus, the government failed to establish the petitioner's opening net worth with the reasonable degree of certainty mandated by this Court in *Holland v. United States*, 348 U.S. 121 (1954).

In *Holland*, this Court set out clear standards that the government must meet in order to establish a *prima facie* showing of tax evasion using the net worth method of proof. In particular, this Court noted:

> [A]n essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset.

348 U.S. at 132. Petitioner is not suggesting the necessity of absolute accuracy in establishing a starting point, nor asking the Court to speculate about assets or prove an illusive negative regarding the absence of otherwise unknown assets in the starting point. Rather, petitioner is asking this Court to recognize that the inclusion of all substantial assets is essential to the government's *prima facie* case, without which the case should not go to the jury.

The government purported to establish the net worth starting point computation in this case through an investigation of pre-indictment transactions during the years 1967 through 1975. The evidence adduced by cross-examination in the government's case-in-chief established clearly and unequivocally that the petitioner had substantial assets which were not accounted for in the net worth starting point. The government's evidence reflected that the petitioner owned more than 1600 acres of farm and ranch land during the years 1967 through 1979, yet failed to account for virtually all of the petitioner's farm and ranch inventory including literally hundreds of head of cattle in its computation. The failure to include these assets materially affects

the validity of the government's circumstantial computation of unreported income.

The government has offered, and the Fifth Circuit approved, a number of "justifications" for failing to include the cattle and other assets in the starting point computation. First, the Fifth Circuit accepted the government's argument that it did not need to include the cattle in the net worth computation because the government had received no "leads" to the cattle. The Fifth Circuit approved the government's argument that:

> [I]f a taxpayer has transactions in previously owned assets which provide him with non-taxable funds, "the taxpayer has a burden to furnish 'leads' on them, so that the Government can investigate and perhaps clear the taxpayer prior to trial." *United States v. Schafer*, 580 F.2d 774, 779 (5th Cir.), *cert. denied*, 439 U.S. 970, 99 S.Ct. 463, 58 L.Ed.2d 430 (1978) (citing *Holland*, 348 U.S. at 135-136, 75 S.Ct. at 135-136).

(App. A at 9a). Second, the government argued that the petitioner had the burden of proving recoverable basis in previously owned assets. The trial court instructed the jurors that: "A taxpayer must report as income the fair market value of property received as income. If he fails to report the fair market value of an asset as income, he cannot later claim the fair market value as his basis. Instead, his basis would be zero." (App. D at 35a). The Fifth Circuit concluded that "the Government can in no way be faulted for failure to identify any possible basis in cattle." (App. A at 9a).

A.

Under *Holland*, the burden on the government to establish the starting point with reasonable certainty is not a shared or joint duty with the defendant:

> Once the Government has established its case, the defendant remains quiet at his peril. *Cf. Yee Hem v. United States*, 268 U.S. 178, 185, 69 L. Ed. 904, 906, 45 S. Ct. 470. The practical disadvantages to the taxpayer are lessened by the pressures on the Government to check and negate relevant leads.

Holland, 348 U.S. at 138-39. Only when the government has established a *prima facie* case of taxes due and owing does the burden shift to the defendant.

Under *Holland* the "leads" doctrine is not a substitute or alternative for establishing the starting point with reasonable certainty. It is an added burden which requires the government to investigate "explanations of the Defendant reasonably susceptible of being checked." 348 U.S. at 138. Where relevant leads are not forthcoming, the government is not relieved of its burden to establish the starting point with reasonable certainty. Rather, the government is "not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the Defendant." *Id.* Thus, when the government has not received relevant leads, it need not prove that it has investigated *every possible source* of nontaxable income. This is no license to ignore possible sources of nontaxable income of which the government has learned both through the defendant and through its own independent investigation.

In this case, the government has not based its refusal to include the cattle in the net worth starting point on the ground that it did not know of the cattle and could not have discovered the cattle through its investigation. Cattle are not an asset like cash accumulations which are "peculiarly within the knowledge of the Defendant." *Holland*, 348 U.S. at 138. The petitioner told the government that he had been given cattle and included some cattle sales in his tax returns

for the years 1977 and 1979. The special agent admitted that he knew of the existence of such cattle, but ignored them because he did not know their basis.

In addition, the government argued that the petitioner was required to come forward with evidence that these assets would affect the net worth computation over the indictment period before the government could be required to include them in the starting point computation. The Fifth Circuit, relying on its earlier decision in *United States v. Schafer*, 580 F.2d 774 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978), held that the petitioner had a burden to furnish leads to transactions in previously owned assets which provided him with nontaxable funds during the indictment period. (App. A at 9a).

The Fifth Circuit's argument is patently erroneous and violates the petitioner's constitutional rights by shifting the burden to the petitioner to establish the net worth starting point with "reasonable certainty." Following the logic of this argument, the government would be relieved of almost all investigatory burden in establishing its *prima facie* case since it would be required to include in the starting point computation only those assets in which the defendant could show transactions during the indictment period. This new rule not only violates the standards set by this Court in *Holland*, but also violates the petitioner's Fifth Amendment right to remain silent in the face of a criminal charge and require the government to prove each fact necessary to constitute the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

B.

After instructing the jury on the appropriate basis for an asset acquired by inheritance or as a gift, the Court in-

structed the jury on the treatment of assets received as income:

> A taxpayer must report as income the fair market value of property received as income. If he fails to report the fair market value of an asset as income, he cannot later claim the fair market value as his basis. Instead, his basis would be zero.

(App. D at 35a). Petitioner objected to this instruction as implying a "waiver" of his basis in assets.

Petitioner maintains that the cattle were nontaxable gifts which he was not required to report on his income tax return. Petitioner's claim that the cattle were gifts was supported by the uncontroverted trial testimony of the donors, Myra Oates and Stacy Oates Beardon. Petitioner, in good faith, relied on the donors' statements of intent and the advice of his accountant and bookkeeper that the gifts were not taxable and should not be included in his income tax returns. The government ignored the donors' express donative intent and asserted unilaterally, and without producing evidence to support its contention, that the cattle were income to petitioner in 1974. The government argued that, in failing to report the cattle as income in his 1974 tax return, petitioner affirmatively waived any tax basis in the cattle.

The doctrine of waiver or quasi-estoppel has never been applied in a criminal tax case. That doctrine applies only where the taxpayer is allowed to make an election as to the tax treatment of an asset or where the taxpayer is required to determine the value of an asset acquired by gift, devise, or operation of law. It imposes a "duty of consistency" on the taxpayer so that he cannot later reverse an election and obtain a double tax advantage. *See Alamo National Bank v. Commissioner*, 95 F.2d 622 (5th Cir.), *cert. denied*, 304 U.S.

577 (1938); *Beltzer v. United States*, 495 F.2d 211 (8th Cir. 1974). Since taxable income is defined by statute and must be declared in the tax year in which it is received, *Burnett v. Sanford & Brooks Co.*, 282 U.S. 359, 363 (1931), no taxpayer may elect whether or when to recognize the value of an asset received as income.

Even if the doctrine of quasi-estoppel were held to apply in cases where the taxpayer erroneously treats taxable income as nontaxable, the facts of this case do not support application of the doctrine. If, by omitting the cattle from his 1974 tax return, petitioner is deemed to have made an affirmative representation that the cattle were gifts to him, he does not wish to change his representation but consistently maintains that the cattle are gifts and have a basis in his hands of $75,600. It is the government which, having accepted petitioner's tax return for 1974, now wishes to treat the cattle received in that year as taxable income. *See Bennet v. Helvering*, 137 F.2d 537, 538 (2d Cir. 1943); *Commissioner v. Dwyer*, 203 F.2d 522, 525 (2d Cir. 1953).

In holding that petitioner's failure to report the receipt of cattle as income in preindictment years constitutes a "waiver" of basis in those assets for purposes of calculating petitioner's opening net worth, the Fifth Circuit is in direct conflict with this Court's decisions in *Holland* and in *Spies v. United States*, 317 U.S. 492 (1943). *Spies* prohibits conviction for criminal tax fraud without proof that the defendant acted with "some element of evil motive and want of justification" in failing to disclose the liability. *Id.* at 498. Under the new rule established by the Fifth Circuit in this case, a defendant may be convicted of criminal tax fraud because he failed to report the receipt of assets as income in a preindictment year and then failed to report receipts from the sale of those assets as income during the indictment period under the erroneous belief that he had a deductible basis in those

assets. In effect, the defendant's conviction can be based on a mere failure to declare income during tax years not covered by the indictment. It allows the government to shift increases in the defendant's net worth from preindictment years into the indictment period where they are treated as taxable and thus as *prima facie* evidence of the defendant's guilt.

In this case, the government shifted $75,600 worth of assets from the preindictment to the indictment period and treated the resulting apparent increase in the petitioner's net worth as presumptively taxable income. Where the indictment charged the petitioner with only $20,600 of unreported income in 1976 and $26,800 in 1977 (and the government's summary witness showed unreported income of only $34,459 in 1976 and $35,355 in 1977) this error can hardly be considered *de minimis*.[1]

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[1]The government argued, and the Fifth Circuit accepted, that even if the cattle had been included in the opening net worth computation, its effect on the net worth computations would have been *de minimis*. App. A at 9a-10a. The Fifth Circuit reached this conclusion by noting that the petitioner had reported only $21,581.73 worth of cattle sales over the indictment period and that the government's evidence reflected only two additional sales amounting to approximately $15,000.00 in 1977 and 1978.

The Fifth Circuit refused to question the adequacy of the government investigation, since it insisted that the petitioner had the burden to provide leads to transactions in previously owned assets. Yet the petitioner, in good faith, believed that the cattle were gifts when received, and consistently treated them as gifts. If the petitioner sold additional cattle during the indictment period, he would have had no reason to report the cash receipts from the sale of those cattle in his income tax returns unless he recovered more than his gift basis from the sales. Nevertheless, the court simply assumed that the petitioner's failure to report additional cattle sales on his income tax returns demonstrated that he had no such transactions during the indictment period and further assumed "that the proceeds for sale of cattle generated more unexplained increase in net worth." App. A at 8a.

III. The Government Must Both Identify A Likely Source Of Taxable Income And Negate All Known Sources Of Nontaxable Income Where The Defendant Has A Likely Source Of Nontaxable Income

In *Holland v. United States*, 348 U.S. 121 (1954), this Court set out the basic requirements for establishing a *prima facie* case of criminal tax evasion using the net worth method of proof. In describing the net worth method, this Court noted:

> One basic assumption in establishing guilt by this method is that most assets derive from a taxable source, and that when this is not true the taxpayer is in a position to explain the discrepancy. The application of such an assumption raises serious legal problems in the administration of the criminal law.

348 U.S. at 126. In explaining the weaknesses in "the equation of unexplained increases in net worth with unreported taxable income," this Court pointed out that gifts, inheritances, and the like might account for newly acquired wealth. Such receipts are not statutory income and are not taxable to the recipient.

In spite of the dangers posed by the assumption that increases in net worth are due to taxable income, this Court in *Holland* determined that proof of a "likely source of taxable income" would suffice to establish a *prima facie* case of criminal tax evasion. This assumption, however, would not be allowed to shift the burden of proof:

> The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty. The settled standards of criminal law are applicable to net worth cases just as to prosecutions for other crimes. Once the Government has established its case, the Defendant remains quiet at his peril.

348 U.S. at 138-39.

In *United States v. Massei*, 355 U.S. 595 (1958), this Court supplemented the *Holland* rule, holding that where the government could negate all possible sources of nontaxable income, there would be no necessity for proof of a "likely source" of taxable income. 355 U.S. at 595. Most Circuits have treated *Holland* and *Massei* as establishing two alternative methods of proof under the net worth method. *See United States v. Grasso*, 629 F.2d 805 (2d Cir. 1980); *United States v. Goichman*, 547 F.2d 778 (3d Cir. 1976); *United States v. Dwoskin*, 644 F.2d 418 (5th Cir. 1981). Some Circuits have combined the rules to require the government both to show a likely source of taxable income and to negate all nontaxable sources. *See United States v. Beasley*, 585 F.2d 796 (5th Cir. 1978); *United States v. Giacalone*, 574 F.2d 328, 330 (6th Cir. 1978); *United States v. Bethea*, 537 F.2d 1187 (4th Cir. 1976). The difference between these two interpretations of the government's burden of proof is substantial, particularly where the defendant has both a likely source of taxable income and a likely source of nontaxable income.

Since this Court decided *Holland* and *Massei*, this Court has not addressed the government's burden of proof in establishing taxes due and owing under the net worth method of proof. In light of this Court's subsequent decisions in *In re Winship*, 397 U.S. 358 (1970) and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), this Court must consider whether the government has met its burden to prove beyond a reasonable doubt each fact essential to the crime of tax evasion where it fails to negate known nontaxable sources of the defendant's net worth increase.

There can be no crime of income tax evasion unless the defendant had undeclared taxable income. The Internal

Revenue Code explicitly excludes gifts, inheritances, and other specific transactions from the definition of "income" subject to taxation. I.R.C. § 102(a) (1982). Thus, a taxpayer may have an increase in his net worth of $100,000 in one year and be entirely innocent of tax evasion if the increase in net worth is attributable, for instance, to gifts. This characteristic makes tax evasion a crime without a tangible corpus delicti. Thus, the claim that net worth increases are due to the receipt of nontaxable gifts is not an affirmative defense which is a separate issue only indirectly connected with an element of the crime, but is the negation of an essential element of the crime, the taxability of the income. To require the defendant to prove that increases in his net worth are derived from nontaxable sources where an essential element of the crime requires that those increases be derived from taxable sources, violates the defendant's due process rights under the Fifth Amendment. To shift to the defendant the burden of proof that no criminal offense in fact occurred is a travesty of constitutional due process. *See In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977). Yet that is precisely what happens when a defendant has a likely source of nontaxable income and the government fails to negate likely sources of nontaxable income. In such cases, the government must meet an initial burden to establish that the defendant had taxable receipts in excess of those declared on his income tax returns, and the government must show affirmatively that those receipts are not from nontaxable sources. The government must establish both the taxability of the receipts and the lack of sufficient income from nontaxable sources beyond any reasonable doubt in order to establish taxes due and owing, an essential element of the crime.

In this case, unlike most cases brought under the net worth method, the petitioner has a likely source of nontaxable income.

The trial court instructed the jury on the net worth method of proof as follows:

> If the evidence in the case shows beyond a reasonable doubt that the defendant's net worth, computed in the manner just stated, was increased during the taxable year, then the jury may draw the inference and find that the defendant had receipts of either money or property during that year. If the evidence in this case also establishes beyond a reasonable doubt that the defendant had one or more possible sources of taxable income, or that the receipts did not come from nontaxable income, then the jury may draw a further inference and find that such receipts constituted taxable income to the defendant.

(App. D at 32a-33a). This instruction allowed the jury to infer from either evidence of a likely source of taxable income or from evidence that the receipts did not come from nontaxable income that any increases in net worth constituted taxable income to the petitioner. Thus, in its general instruction on the net worth method, the court did not place upon the government the burden of proving both a likely source and negating known nontaxable sources. Nevertheless, the court later instructed the jury that: "The burden is always upon the government to establish beyond a reasonable doubt that any amount reflected in the defendant's increased net worth, plus nondeductible expenditures, was from taxable, rather than nontaxable sources." (App. D at 35a).

The government failed to establish that the apparent increases in petitioner's net worth came from taxable rather than nontaxable sources. In failing to include substantial assets in petitioner's opening net worth calculation, the government effectively shifted nontaxable assets into the

indictment period where it treated them as currently taxable income. At the same time, the government precluded jury consideration of gifts received by the petitioner during the indictment period by obtaining an instruction on gifts which, in the context of this case, created a conclusive presumption, contrary to law, that those receipts were taxable when received and could not be treated as gifts by the jury. Finally, the government declared that it could rely on what it considered an "unequivocal admission" by the petitioner that his "gift book" contained "substantially all" his nontaxable receipts over the preindictment and indictment periods. The government used this so-called admission to limit its investigation into nontaxable sources and to shift the burden of proof to the defendant that he had nontaxable sources in excess of those contained in the "gift book." These errors cumulatively relieved the government of any burden to prove that the petitioner's alleged net worth increases did not come from nontaxable sources and left it free to convict the petitioner on a mere showing of a likely source of taxable income.

The failure of the government to negate known nontaxable sources of income cannot be considered harmless error. This failure affects substantial rights of the petitioner by shifting the burden of proof to the petitioner and requiring him affirmatively to disprove the government's allegation that the increases in his net worth derived from currently taxable income. *Chapman v. California*, 386 U.S. 18 (1967). The burden rests with the government to show that its failure to negate known nontaxable sources was not harmless error. *Chapman*, 386 U.S. at 24. Unless the government can show that it was harmless beyond a reasonable doubt, this court must reverse the petitioner's conviction. *Id.*

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

David H. TERRELL, a/k/a Daniel H. Ford, Defendant-Appellant.

No. 84–1366.

United States Court of Appeals, Fifth Circuit.

Feb. 14, 1985.

Defendant was convicted in the United States District Court for the Western District of Texas, H.F. Garcia, J., of willfully attempting to evade federal income taxes. Defendant appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) there was no error with respect to proof of net worth starting point; (2) instructions were not objectionable as erroneously shifting burden of proof; (3) trial court properly charged jury on definition and elements of a gift; (4) in view of information which had been in defendant's possession for nearly six months, district court did not abuse discretion in denying continuance upon the Government's submission of "source and application of funds" analysis to defense five days before trial; (5) trial court did not abuse discretion in denying severance of count involving 1979 return though request was made due to involvement of defense counsel in preparation of taxpayer's return for 1979; and (6) there was no error in the admission of testimony.

Affirmed.

Appeal from the United States District Court for the Western District of Texas.

Before GOLDBERG, POLITZ and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

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David H. Terrell appeals from his conviction by jury on four counts of willfully attempting to evade federal income taxes for the years 1976 through 1979, in violation of 26 U.S.C. § 7201. The proof showed that appellant's taxable income during those years totaled in excess of $439,000, while he reported only $217,000. Appellant alleges, *inter alia*, that the government failed to establish a *prima facie* case as to his net worth starting point, and that the court erroneously shifted the burden of establishing the net worth starting point to him. Appellant also alleges several errors relating to jury instructions and evidentiary rulings. We find no error, and accordingly affirm.

I. FACTS

David H. Terrell has made his living as an evangelist since the late 1950's. In 1965, he formed a tax-exempt corporation known as the New Testament Holiness Church. He preaches under the auspices of that church, while not receiving any direct compensation from the corporation. Because he received no direct compensation, appellant's income for the indictment period, 1976 through 1979, was reconstructed using the net worth plus expenditures method of proof.[1] Appellant's net worth increases and taxable income for the indictment period as established by the evidence are:

Year	Net Worth Increases	Corrected Taxable Income	Taxable Income Not Reported	Tax Due and Owing
1976	$ 82,604.51	$ 67,901.78	$ 34,459.31	$ 19,071.07
1977	69,451.27	72,764.42	35,355.77	18,289.75
1978	116,145.49	123,566.48	86,454.49	43,220.21
1979	200,760.47	194,121.32	84,846.70	42,232.56
Total	$468,961.74	$458,354.00	$241,116.27	$122,813.59

[1]The net worth method of reconstructing income is discussed *infra* in Part II.

The increases in appellant's net worth over the indictment period were largely attributable to his acquisition of loan receivables, five parcels of real estate totaling 482 acres at a cost of $347,315, and tradings in sixteen automobiles, including several motor homes, at a total cost of $150,000. In addition, during 1978 and 1979, appellant paid cash for his $138,000 residence and a $29,000 guitar-shaped swimming pool.

The likely source of appellant's income was money earned through his ministry. Terrell preached daily at branches of his church and traveling tent revivals. At each service, in addition to collecting church offerings, appellant collected personal contributions known as "love offerings". Typically, a bucket would be placed in front of the congregation for church offerings, and Terrell would make an appeal to his audiences to help him personally by handing him money directly or placing it in one of the pockets of an apron that he wore at the time of the offerings. In addition, contribution envelopes were distributed at services resulting in the receipt of substantial sums of money through the mail at a post office box in Waco, Texas. After a particular service, receipts were at least partially recorded on slips of papers referred to as "love offering breakdowns". Although as a matter of course, the offerings received were counted and recorded on breakdowns after Saturday morning revivals, they were frequently not recorded for revivals during the week. Appellant had exclusive control over the record keeping process of the breakdowns. After services, the cash received and all records were placed in Terrell's possession. Despite the fact that Terrell would receive between $400 and $5,000 a week through the mail, the breakdowns only twice included receipts from offerings received in this manner, both times after he had been notified that he was the subject of a criminal investigation.

Terrell had been advised by his accountant that the money he personally received during services was taxable income. He was instructed to keep track of his receipts and report them to his tax return preparers. Terrell provided his tax return preparers with the "love offering breakdowns" as a purported

record of his total receipts. The breakdowns were submitted weekly, and showed average gross weekly income of approximately $800 to $1,000. Yet Terrell told IRS agents that he often received $4,000 to $5,000 in the course of a week-long revival.

The evidence produced at trial represented a three-year investigation by the Internal Revenue Service. IRS agents consulted with Terrell at the beginning of the investigation and questioned him about his non-taxable sources of income to ensure that they would be excluded from the net worth calculations. At that time, Terrell and his attorney provided the agents with a list of his non-taxable sources of income dating back to 1967, including loans and various gifts that he had received while he was a minister. The list in a form of a book was represented to the IRS agents as itemizing "substantially all his gifts for those years". The Government credited appellant with all gifts indicated in the book, and built that figure into its net worth computation as non-taxable sources of income.[2]

In order to ensure that pre-indictment savings could not have accounted for the increases in Terrell's net worth, the government conducted a "source and application of funds" analysis of his finances between 1967 and 1975. The analysis showed that Terrell's expenditures exceeded his reported income plus nontaxable gifts during that period by $229,000. This analysis was used for the sole purpose of determining that appellant held no substantial cash-on-hand at the beginning of the indictment period.

During the time covered by the investigation, Terrell made several attempts to conceal his income. Terrell possessed numerous bank accounts with substantial balances, and dealt almost exclusively in cash. Among his cash purchases were an automobile for $12,000 and real estate for $25,000. When purchasing property in 1976, appellant paid a real estate commis-

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[2]Appellant was credited in the net worth analysis with total non-taxable gifts of $57,878 for the years 1976 through 1979.

sion of $10,000 and requested that the agent not report it until the following year. Also in 1975, Terrell legally changed his name to Daniel H. Ford and began purchasing assets in the name of Ford, including two farms of 375 and 400 acres. Yet he continued to file tax returns under the name of Terrell. During the course of the IRS investigation, Terrell discussed his real estate holdings with IRS agents but never mentioned those properties held in the name of Ford. He possessed 25 automobiles over the investigation period in six different names, using eight different home addresses. Real estate was purchased in six different names, and he maintained Texas driver's licenses in both the names of Terrell and Ford. Furthermore, in an attempt to characterize some of his expenditures as loan repayments, Terrell on two separate occasions approached individuals to execute loan papers in order to substantiate nonexisting loans.

Terrell was indicted on four counts of willful attempt to evade federal income taxes for the years 1976 through 1979, in violation of 26 U.S.C. § 7201. The indictment charged that he earned taxable income during those years totaling in excess of $439,000, while reporting only $217,000. His alleged tax liabilities for those years totaled in excess of $184,000, although he reported only $71,000. After a thirteen-day jury trial, Terrell was convicted on all four counts. He was sentenced to five years imprisonment to be served concurrently on counts One through Three, and a five-year sentence on Count Four was suspended and appellant placed on probation. Terrell was fined $5,000 on each count and ordered to pay the cost of prosecution. A notice of appeal was timely filed.

II. NET WORTH STARTING POINT

Section 7201 of 26 U.S.C. imposes criminal sanctions upon "any person who willfully attempts in any manner to evade or defeat any tax imposed by this title". To establish a violation of § 7201, the Government has the burden of proving beyond a reasonable doubt that (1) the defendant owed taxes for the period in question; (2) that he attempted to evade payment of

them; and (3) that he acted willfully. *Sansone v. United States*, 380 U.S. 343, 351, 85 S.Ct. 1004, 1110, 13 L.Ed.2d 882 (1965), *United States v. Dwoskin*, 644 F.2d 418, 419 (5th Cir.1981). The primary contention of appellant is that the Government failed to meet its burden of proof on taxes owing for the indictment period because the Government's reconstruction of appellant's income using the net worth method was incomplete.

Where a taxpayer's records are an inadequate basis for determining income tax liabilities, the net worth method of determining income has been utilized in criminal tax prosecutions to reconstruct income. Using this method, the Government first must establish the taxpayer's total value of assets at the beginning of a given period and compare that worth to the value of the taxpayer's assets at the end of the period. The Government must take into account cash-on-hand as an asset at the starting point of the net worth evaluation. Increases in net worth are subject to certain adjustments before it can be claimed that such increases represent income acquired over the period in question. For example, the Government subtracts from net worth increase any gifts, inheritances, loans and the like that may account for unexplained increases in net worth. Nondeductible expenditures are then added back into the net worth figure. Once these adjustments have been made, the Government attempts to prove that any unexplained increase in net worth represents unreported income.

The use of the net worth method in criminal tax prosecutions was approved in *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954). The Court recognized that such a reconstruction of income might be the only way to prosecute individuals who kept inaccurate records and who cleverly concealed income. But the Court's approval was given with the caveat that establishing unreported income by the net worth method "involved something more than the ordinary use of circumstantial evidence in the usual criminal case." *Id.* at 124, 75 S.Ct. at 130. The Court in *Holland* recognized that an innocent individual with poorly kept records may not always be in a position to explain discrepancies in net worth. In order to

avoid the pitfalls of the net worth system, the Government must conduct a meticulous investigation, and the investigation techniques and figures are subject to close scrutiny. Moreover, the court must be particularly mindful of the potential dangers of using the method in drafting its instructions. *Id.* at 129, 75 S.Ct. at 132.

In *Holland*, the Supreme Court set out the standard that the Government must meet in order to establish a *prima facie* showing of tax evasion using the net worth method. The Government must establish with "reasonable certainty" an opening net worth as the basis upon which to calculate increases in the taxpayer's assets. "The importance of accuracy in this [net worth] figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset." *Id.* at 132, 75 S.Ct. at 134. Appellant argues that the Government has not met its burden of proving an opening net worth with reasonable certainty because it did not include certain assets in its starting net worth.

A. The Herd of Cattle.

Appellant claims that he received as a gift a herd of cattle worth $76,500 in 1974, prior to the indictment period. He alleges that at least some of the cattle were sold sometime during the indictment period, and that the proceeds were used to purchase other property. He argues that the basis in all of the cattle should have been added to the starting net worth evaluation, and that the Government knew of the existence of the cattle during their investigation but intentionally failed to take them into consideration in its net worth calculation.

Assets may be included in the net worth analysis at their basis so long as cost basis is consistently used throughout the analysis. *Dwoskin*, 644 F.2d at 421. Using cost basis to determine net worth means that assets preexisting the indictment period are a source of non-taxable funds only to the extent of that basis. Appellant contends that he had a herd of cattle with a basis of $75,600 that should have been included in the net

worth starting point calculation. But appellant overlooks the elementary fact that the basis established in a net worth calculation is irrelevant so long as the same basis is used throughout and at the end of the calculation. Thus the only relevance of the herd of cattle already owned by appellant at the beginning of the tax period is to be found in purchases and sales of the cattle during that period. It is the profit and loss realized from such sales that have the sole relevance to the prosecution for income tax evasion. Actually, the cattle and cattle sales could at best create only a minor lessening of appellant's tax liability. But because he stresses them in his argument, we go into them in some detail.

No cattle sales were reported by Terrell for the years 1976 or 1978. On his 1977 return, he reported the purchase and resale of $1,600 worth of cattle. Terrell's income tax return for 1979 indicated that he had sold $19,981.73 worth of cattle in which he claimed no recoverable basis. This return was filed after his second interview with the Government. At this point, appellant had already turned over to the government the "gift book" in which he identified what he considered "substantially all" the gifts he had received for the years investigated. After receiving the 1979 tax return reporting the cattle sales, the Government once again contacted appellant to state that the return did not account for all his expenditures for the year and to inquire if there had been any additional sources of income. Nothing was said about the cattle, and appellant never provided any leads to sales of cattle in which he had a basis.

In its investigation, however, the Government did discuss cattle sales with four witnesses, and all leads provided by those witnesses were traced. In addition to the sales reported on the 1979 return, the investigation turned up two additional sales. In 1977, Terrell apparently sold $9,000 worth of cattle which he did not report, and similarly, $6,000 worth in 1978. Because appellant had not volunteered any information concerning sales of cattle, the Government concluded that the proceeds for sale of cattle generated more unexplained increase in net worth. But even assuming, *arguendo*, that the basis of this

cattle should have been included in the net worth starting point, and that appellant's basis in the cattle sold was equal to the total proceeds of the sales, the net worth starting calculation would have been off by a maximum of $15,600, the total of the unreported sales. Because the appellant's unreported income for 1977 and 1978 combined exceed $120,000, failure to credit him with the basis in cattle would have had a minimal impact on the net worth starting point. The amount of tax owing for those years would still have been in excess of $100,000.

Appellant, again overemphasizing the importance of the cattle in the case, also contends that the Government failed to establish a *prima facie* case because it failed to follow leads appellant had given them on the existence of the cattle. *Holland*, 348 U.S. at 135, 75 S.Ct. at 135, placed upon prosecutors using the net worth evaluation the burden of investigating leads that may be furnished by the taxpayer that could result in an explanation for increases in net worth. Failure to pursue leads that are reasonably susceptible of being checked could result in serious injustice. Terrell accuses the Government of not following leads to identify non-taxable sources of income, yet the evidence shows that appellant, even during the course of the investigation, continued to conceal information relating to cattle sales. Terrell did not provide the Government with a single lead pertaining to the sale of cattle. Moreover, if a taxpayer has transactions in previously owned assets which provide him with non-taxable funds, "the taxpayer has a burden to furnish 'leads' on them, so that the Government can investigate and perhaps clear the taxpayer prior to trial." *United States v. Schafer*, 580 F.2d 774, 779 (5th Cir.), *cert. denied*, 439 U.S. 970, 99 S.Ct. 463, 58 L.Ed.2d 430 (1978) (citing *Holland*, 348 U.S. at 135-136, 75 S.Ct. at 135-136). *Schafer* also establishes that it is sufficient for the Government to identify with "reasonable specificity" a defendant's basis in assets. *Id.* at 778.

We find that the Government can in no way be faulted for failure to identify any possible basis in cattle. Even if Terrell

did have a basis in these cattle, the effect on the net worth computation woul be minimal because substantial sums for the years 1977 and 1978 would still be owing above and beyond the amount in question. Moreover, the Government was diligent in following up on all leads relating to the cattle, despite the fact that Terrell himself was uncooperative in providing leads.

B. Source and Application of Funds Analysis: Cash-on-hand.

Appellant also claims that the Government's starting net worth figures were inaccurate because he was not given credit for having any cash-on-hand at the beginning of the indictment period. In its net worth analysis, the Government concluded that there was no cash-on-hand, while Terrell claimed that he had approximately $200,000, at the beginning of the indictment period. The Government must take into consideration cash-on-hand as an element of its net worth analysis. While the source and existence of cash-on-hand need not be proved with mathematical exactitude, the amount must be established with reasonable certainty. *United States v. Boulet*, 577 F.2d 1165, 1170 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114, 99 S.Ct. 1017, 59 L.Ed.2d 72 (1979). The question of whether a defendant has a substantial amount of cash-on-hand at the beginning of the indictment period must be carefully investigated because the existence of a cash hoard could greatly distort the net worth evaluation. Unaccounted for funds that surface during the course of the net worth evaluation might be explained by the fact that a defendant accumulated large sums of cash which he kept on hand and began to spend during the indictment period.

As a means of determining whether appellant had an appreciable amount of cash-on-hand at the beginning of an indictment period, the IRS conducted a "source and application of funds" analysis. Under this analysis, appellant's sources of cash were compared with his expenditures over the investigation period. The surplus (or deficit) from each year covered when expenditures were subtracted from sources of funds was recorded as "net funds available". Net funds for the years 1967

to 1975 were added together to arrive at a "cumulative net funds available" figure. This "cumulative net funds" figure, indicating possible sources of cash accumulated over this preindictment period, represented how much cash appellant was likely to have had on hand at the beginning of an indictment period.

The Government began its investigation of Terrell's funds with the year 1967. All of his returns for the years 1967 through 1975 were examined, and gross receipts indicated on the returns were entered as part of the source of funds analysis. Added to those figures were any other sources identified by the appellant or other witnesses, such as appellant's proceeds from assets listed in his "gift book". As of December 31, 1975, the Government's analysis indicated that Terrell had expended nearly $230,000 more than his total accumulated funds for the nine-year period covered. This means that in order to have arrived even at a figure of zero for cash-on-hand for the net worth starting point figure, appellant would had to have had additional sources of funds between 1967 and 1975 totaling at least $230,000, and more than $400,000 of additional funds to have netted his $200,000 cash-on-hand figure. The only use the Government made of the source and application of funds analysis was to conclude that any cash Terrell might have had on hand would not have been substantial enough to affect the opening net worth. This purpose was clearly presented to the jury, and no inference was made that the unaccounted-for expenditures for the investigation years 1967-1975 were at issue in Terrell's prosecution.

Appellant makes a second attack on the source and application of funds analysis, arguing that in its evaluation the Government unjustifiably relied upon his uncorroborated admissions concerning sources of funds. He relies upon *Smith v. United States*, 348 U.S. 147, 154-55, 75 S.Ct. 194, 198, 99 L.Ed. 192 (1954), which requires the Government to corroborate post-offense admissions regarding net worth. We have held, however, that the corroboration requirement does not necessarily extend to admissions relating to cash-on-hand, a figure

that is ultimately incorporated into the starting net worth figure. *United States v. Normile*, 587 F.2d 784 (5th Cir. 1979). In *Normile*, the Government relied on the defendant's statement that he had only $100 cash-on-hand at the beginning of the indictment period because he did not feel safe having larger amounts on hand. The court held that this statement did not necessitate corroboration because "the inherent secrecy of the cash hoard makes it impossible for any but the keeper to know even of its existence, let alone the amount." *Id.* at 786. Thus, we find no error in the use of the source and application of funds analysis to conclude that Terrell had no cash-on-hand at the beginning of the indictment period. The Government clearly met its burden of establishing this fact with reasonable certainty.

In reviewing the record in this case, we can only be surprised by appellant's attack on the thoroughness of the Government's investigation. The investigation consumed three and one-half years. Approximately 20 agents canvassed public records to determine the extent of appellant's holdings. Thirty banks were contacted, and twenty banks produced documents or witnesses. Nearly 300 potential witnesses were interviewed, many of them several times. IRS agents identified in excess of 70 assets purchased and sold by Terrell, and questioned third parties involved in these transactions. Additionally, every expenditure made by Terrell was traced, including all cashier's checks traced back to their sources to determine how they were purchased.

We find appellant has not made a meritorious challenge to the procedures or figures used by the Government in its source and application of funds analysis. We conclude that there was sufficient evidence for the jury to find that there was no cash-on-hand at the beginning of the Government's net worth analysis.

III. JURY INSTRUCTIONS

Appellant also alleges several errors relating to the jury instructions. On the issue of net worth starting point, appellant

claims that the testimony of several prosecution witnesses created the impression that he carried the burden of establishing the net worth starting point and that the court therefore erred in not giving the jury a requested instruction on the burden of proof to correct this impression. This argument is without merit. The trial court's instructions on the net worth method were thorough and accurate. The court clearly explained to the jury that the Government had the burden of proving beyond a reasonable doubt that substantial income tax was owing, and that the net worth method had been used by the Government to establish this element. In alleging the inadequacy of the instruction, appellant ignores the following portion of the charge:

> The burden is always upon the Government to establish beyond a reasonable doubt that any amount reflected in the Defendant's increased net worth, plus nondeductible expenditures, was from taxable, rather than non-taxable sources.

As for appellant's claims that comments by Government witnesses and the prosecutors implied that the burden of proof shifted to appellant, we have carefully examined these statements. If the comments could be taken to have implied a shift in the burden of proof, and we do not feel that they did, the instruction given clearly cured any such emphasis in testimony. *See Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973).

Terrell also challenges the propriety of an instruction dealing with establishing basis in assets. He claims that the court committed error in instructing the jury that Terrell could not claim a basis in assets if he had not reported the receipt of the assets as income in a prior tax year. Appellant's argument refers to the following instruction:

> A taxpayer must report as income the fair market value of property received as income. If he fails to report the fair market value of an asset as income, he cannot later claim

the fair market value as his basis. Instead, his basis would be zero.

Appellant reads this instruction out of context to imply that he could not claim a basis in the cattle because the cattle were received as gifts. We find no such implication in this instruction. The court was careful in framing its charge to the jury to state accurately the law concerning basis in assets received as income, and separately charged the jury on the proper treatment of gifts.

Finally, appellant alleges that the court instructed the jury that all amounts received by a minister were taxable and that the court refused to instruct the jury on the elements of a non-taxable gift. This challenge is a gross misrepresentation of the charges given to the jury. The court instructed:

> The federal income tax is levied on income received by ministers. When an individual provides ministerial services as his trade or business, controls the money he receives in that business, and receives no separate salary, the income of that business is taxable to the minister. Voluntary contributions, when received by the minister, are income to him. Payments made to a minister as compensation for his services also constitute income to him. If money is given to a minister for religious purposes, any money used instead for the personal benefit of the minister becomes taxable income to him.
>
> The law provides that funds or property received from certain sources do not constitute taxable income. Since no income tax is levied on such funds or property, they are not properly reported as income. Such non-taxable funds or property includes such items as gifts, inheritances, the proceeds of life insurance policies, loans and other miscellaneous items.

The court thereafter properly charged the jury on the definition and elements of a gift.[3]

---

[3]The instruction on gifts was as follows:

> It is for you, the Jury, to decide whether certain funds are taxable or

We find that the court's instructions were complete and accurate in all respects and reject all of appellant's objections to them as lacking in merit.

IV. EVIDENTIARY RULINGS

Terrell argues that the court abused its discretion in failing to grant his motion for continuance. Where, as here, the purpose for requesting the continuance was for trial preparation, a

---

nontaxable to the Defendant. In determining whether a payment of money or property to the Defendant is a nontaxable gift, you should look to the intent of the parties at the time the payment was made, particularly the intent of the person making the payment. Such payments are gifts if they proceed from a detached and disinterested generosity, out of affection, respect, admiration, charity, or like impulses. In making this determination, however, you must look at all the facts and circumstances in this case. The characterization given to a certain payment by either the Defendant or the person making the payment is not conclusive. Rather you the members of the Jury, must make an objective inquiry as to whether a certain payment is a gift. You should look at the terms and substance of any request made by the Defendant for the funds. In addition, you may take into account the following factors:

1. A payment is not a gift if it is made to compensate the Defendant for his services. In this connection, you should consider how the defendant made his living.

2. A payment is not a gift if the person making the payment expects to receive anything in return for it. A payment would not be a gift if it was made with the expectation that it would allow the Defendant to remain in business.

3. A payment is not a gift to the Defendant if it is made with the expectation that it will be used to further the religious or ministerial activities of the Defendant.

4. A payment is not a gift if the person making the payment felt he had a duty or obligation to make the payment.

5. A payment is not a gift if the person making the payment did so out of fear or intimidation.

This is not a complete listing of all the factors you should consider. You should take into account all the facts and circumstances of this case in determining whether any payment was a gift.

defendant must show that the court acted with "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *See Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 1616, 75 L.Ed.2d 610 (1983).

Terrell's argument centers around the admission of the "source and application of funds" analysis prepared by the Government and submitted to the defense five days before trial. Appellant represents the analysis as a submission of computations covering the years 1967 to 1975 for the first time only days before trial. Although he does not deny the relevancy of the computations, he alleges he did not have sufficient time to examine the computations and adequately to prepare his defense.

The court properly denied appellant's motion for continuance on the ground that all of the information contained in the analysis had been in his possession for nearly six months. The analysis was a summary of appellant's tax returns over the investigation years, as well as other information, e.g., entries taken from the "gift book" given to the Government by appellant. In short, this analysis, which was completed by the Government in response to Terrell's repeated declarations that he had considerable sums of cash-on-hand at the beginning of the indictment period, presented no surprises for the defense. The district court acted well within its discretionary powers in denying the motion for continuance.

Terrell also alleges that the court erroneously denied his motion for severance of Count Four, the count involving the 1979 return. The request was made due to the involvement of defense counsel in the preparation of Terrell's tax return for 1979. Defense counsel Harvey Sanders and his firm, Leatherwood, Walker, Todd and Mann, were involved in drafting the return, advising changes, and providing some information to be included in the 1979 return. The Government first sought to disqualify defense counsel and his firm on the ground that their involvement in the 1979 return might become an issue at trial and that members of the firm were prospective Government

witnesses. Defense counsel responded by moving to sever Count Four to avoid possible prejudice because of his involvement. After hearing, the court denied both motions, finding that defense counsel's testimony was not indispensable to the Government's case. As for the severance motion, the court accepted the Government's representation that the proof of all counts was essentially the same, and that, therefore, severance would not be warranted. The court also considered the fact that appellant hired an independent attorney, Charles Muller, to assist in his defense when it became obvious that the 1979 return was at issue. Attorney Muller had no connection with Mr. Sanders' firm, and he prepared and signed all defense pleadings in the case.

At trial, the Government did not call Mr. Sanders or any member of the Leatherwood firm as witnesses. The Government did make references to the involvement of defense counsel in the 1979 return, but only after obtaining the permission of the court. References to appellant's attorney were made only in the course of examining one Government witness who had provided accounting services for appellant in the preparation of his tax returns. Much of the information used by the accountant was received from defense counsel, and the Government's questions were limited to defense counsel's role as provider of such information.

The district court's denial of the motion for severance is reviewable only for abuse of discretion. *United States v. Hamilton*, 694 F.2d 398, 400-401 (5th Cir. 1982). In order to demonstrate abuse of discretion, the defendant bears a heavy burden of showing "specific and compelling" prejudice. *Id.*, (quoting *United States v. Morris*, 647 F.2d 568, 570 (5th Cir.1981)). We find that the trial court correctly denied severance and find no compelling prejudice to appellant that would call for reversal on this ground.

Appellant's final contention is that prejudicial testimony relating to his religious beliefs and general moral character was admitted at trial. We note that the Government repeated in

opening and closing arguments that the appellant was not on trial for his religious beliefs, and we find no testimony in the record that brings into question any of his religious beliefs. Terrell's claim concerns the testimony of several witnesses. The first allegation of prejudice relates to the testimony of one of Terrell's religious followers who testified that Terrell solicited funds by prophesying to his audiences that tragedy would befall them if they did not make offerings. The witness testified that Terrell said he was a prophet and that he who gave unto him would have a prophet's reward. The Government argues that the manner in which offerings were obtained was relevant to the issue of whether the offerings were given as gifts or as compensation, and that the probative value outweighed any potential prejudice.

Two female witnesses were questioned regarding land and property transactions. Appellant argued that the Government attempted to imply that he had improper relationships with the two women. The questions directed to these women dealt with the joint property owned by the women and Terrell. In relation to witness Betty Caroline Johnson, the Government obtained court approval before delving into any personal matters. The Government pointed out that on three occasions, Ms. Johnson signed deeds or sale contracts for property as "Betty C. Terrell". In relation to another piece of property, she purchased the property for which the sale contract was drawn up in the names of David and Betty Johnson. Yet the witness claimed that appellant had no interest in the property. The Government contends that examination of this witness was necessary to establish possible bias of the witness and also to establish the possible source and application of some of Terrell's funds. The witness had an income of approximately $300 a month, half of which she gave to the church. Yet her payments on property she purchased in 1977 totalled in excess of $7,000.

In determining whether the probative value of evidence outweighs potential prejudicial impact, this Court must accord great deference to the district court. We do not find that the inquiries in question unfairly prejudiced appellant. The court's

rulings on the admission of the challenged testimony must go undisturbed.

We perceive no error in the thorough case presented by the government nor in the careful trial of the case by the district court.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1366

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

V.

DAVID H. TERRELL, a/k/a
DANIEL H. FORD,
Defendant-Appellant.

U.S. Court of Appeals
FILED
March 19, 1985
Gilbert F. Ganucheau
Clerk

Appeal from the United States District Court for the Western District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion FEBRUARY 14, 5 Cir., 1985, ____ F.2d ____)

(March 19, 1985)

Before GOLDBERG, PLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT: Clerk's Note:
See Frap and Local Rules 41 for Stay of the Mandate.

/s/ J.S. WILLIAMS
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1366

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID H. TERRELL, a/k/a
DANIEL H. FORD,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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U.S. Court of Appeals
FILED
April 1, 1985
Gilbert F. Ganucheau
Clerk

ORDER:

☒ The motion of appellant for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☐ The motion of appellant for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and

including April 18, 1985 , the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of _____
for a further stay of the issuance of the mandate is GRANTED to and including ____, under the same conditions as set forth in the preceding paragraph.

☐ The motion of _____
for a further stay of the issuance of the mandate is DENIED.

/s/ J.S. WILLIAMS
UNITED STATES CIRCUIT JUDGE

United States Court of Appeal
Fifth Circuit

Office of the Clerk
800 Camp Street
New Orleans, LA 70130

April 2, 1985

Gilbert F. Ganucheau, Clerk

COMM.	FTS
(804) 589	682
CASE INQUIRIES	
East. & Mid. LA	6194
No. & West. TX	4167
So. & East. TX	6131

MS., Agency & West. LA	2892
Other	8614

Mr. Charles W. Vagner, Clerk
United States District Court
Room 213, 200 West 8th
Austin, TX 78701

No. 84-1366 - USA -vs- David H. Terrell a/k/a
Daniel H. Ford
USDC# A 83 CR 37

☒ Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.

☐ The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

☐ We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

☒ Copy of the Court's opinion.

☒ Original record on appeal or review. 13 volumes and 2 supp. volumes

☒ Original exhibits. 2 Boxes

☐ Bill of Costs approved by this Court. ☐ Copy enclosed to counsel.

Sincerely,

GILBERT F. GANUCHEAU, Clerk

By: /s/ DELLA M. JONES
Deputy Clerk

cc: (Letter Only)
Hon. H. F. Garcia
Mr. Charles J. Muller, III
Mr. Harvey G. Sanders, Jr.
Mr. Glen L. Archer, Jr.
Mr. Edward C. Prado

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

A-83-CR-37

UNITED STATES OF AMERICA,

Plaintiff,

VS.

DAVID TERRELL,

Defendant.

FILED
February 3, 1984
Charles W. Vagner, Clerk
By: /s/ JCD, Deputy

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties.

It becomes my duty, therefore, to instruct you on the rules of law that you must follow and apply in arriving at your decision in the case.

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your consideraation. It is also my

duty at the end of the trial to instruct you on the law applicable to the case.

You, as jurors, are the judges of the facts. But in determining what actually happened in this case—that is, in reaching your decision as to the facts—it is your sworn duty to follow the law I am now in the process of defining for you.

And you must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. That is, you must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I give it to you, regardless of the consequences.

By the same token it is also your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors in this case, and they have the right to expect nothing less.

The indictment or formal charge against a defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all, and no inference whatever may be drawn from the election of a defendant not to testify. The government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so you must acquit him.

Thus, while the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all of the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As stated earlier it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you. Also, during the course of a trial I occasionally make comments to the lawyers, or ask questions of a witness, or admonish a witness concerning the manner in which he should respond to the questions of counsel. Do not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You may also consider either direct or circumstantial evidence. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circum

stantial evidence" is proof of a chain of facts and circumstances indicating either the guilt or innocence of the defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It requires only that you weigh all of the evidence and be convinced of the defendant's guilt beyond a reasonable doubt before he can be convicted.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider his relationship to the government or to the defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; his bias or prejudice, if any; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that

witness such credibility or weight, if any, as you may think it deserves.

The fact that a witness has previously been convicted of a felony, or a crime involving dishonesty or false statement, is also a factor you may consider in weighing the credibility of that witness. The fact of such a conviction does not necessarily destroy the witness' credibility, but is one of the circumstances you may take into account in determining the weight to be given to his testimony.

In determining whether any statement, claimed to have been made by a defendant outside of court was knowingly and voluntarily made, the jury should consider the evidence concerning such a statement with caution and great care, and should give such weight to the statement as the jury feels it deserves under all the circumstances.

The jury may consider in that regard such factors as age, sex, training, education, occupation, and physical and mental condition of the defendant, his treatment while under interrogation, and all the other circumstances in evidence surrounding the making of the statement.

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

The testimony of an accountant and the charts or summaries prepared by him, and admitted in evidence, are received for the

purpose of explaining facts disclosed by books, records, and other documents which are in evidence in the case. Such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, the jury should disregard them.

In other words, such charts or summaries are used only as a matter of convenience; so if, and to the extent that, you find they are not in truth summaries of facts or figures shown by the evidence in the case you are to disregard them entirely.

You will note that the indictment charges that the offense was committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

The word "willfully," as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

Section 7201 of the Internal Revenue Code, 26 U.S.C. Section 7201 provides in part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title [shall be guilty of an offense against the United States.]

The gist of the offense prohibited by the statute is a willful attempt on the part of the defendant to evade and defeat the tax imposed by the income tax law. In order to establish that

offense, the government must prove both of the following elements beyond a reasonable doubt:

> First: That substantial income tax was due and owing from the defendant in addition to that declared in his tax return; and
>
> Second: That the defendant knowingly and willfully attempted to evade or defeat such tax.•

The proof need not show the precise amount or all of the additional tax due as alleged in the indictment, but it must be established beyond a reasonable doubt that the accused knowingly and willfully attempted to evade or defeat some substantial portion of such additional tax as charged.

The word "attempt" contemplates that the defendant had knowledge and understaning that, during the particular tax year involved, he had income which was taxable, which he was required by law to report; but that he nevertheless attempted to evade or defeat the tax, or a substantial portion of the tax on that income by willfully failing to report all the income which he knew he had during that year.

To establish the first of the essential elements of the offenses charged in the indictment, that is, the understatement of the tax in the defendant's return, the government relies upon proof by the so-called "net worth and expenditures method." A person's "net worth" is the difference between his total assets and his total liabilities, at any given date. It is the difference between what he owns, and what he owes, at that time. If he has more assets at the end of the year than he had at the beginning, and the liabilities remain the same, his net worth has obviously increased. However, in determining net worth, only the cost price of the asset is to be considered; mere increases in market value, which have not been actually realized through sale or conversion into cash, must not be taken into account when computing net worth in a case such as this.

If the evidence in the case shows beyond a reasonable doubt that the defendant's net worth, computed in the manner just

stated, was increased during the taxable year, then the jury may draw the inference and find that the defendant had receipts of either money or property during that year. If the evidence in this case also establishes beyond a reasonable doubt that the defendant had one or more possible sources of taxable income, or that the receipts did not come from nontaxable income, then the jury may draw a further inference and find that such receipts constituted taxable income to the defendant.

If, in addition to proving an increase in a defendant's net worth, the evidence in the case further establishes that the defendant spent money on living expenses, taxes and other items which did not add to his net worth at the end of the year, the jury may draw the inference and find that those expenditures also came from funds received during the year. Those expenditures may also be taken into account in determining the amount of a defendant's net income for the year, provided of course that they were not expenditures which the defendant is entitled by law to claim as deductible items, in computing his taxable income for the year.

In this case. the government has undertaken to prove what the defendant was worth at the beginning of each taxable year, and what he was worth at the end of that year, in an effort to show that the defendant's net worth increased during each year. The prosecution has also introduced evidence in an effort to establish that the defendant paid out various amounts of money during each taxable year for nondeductible items.

The government contends that any increases in a defendant's net worth during each taxable year, plus any nondeductible expenditures by the defendant for that year, as shown by the evidence in the case, represents the defendant's correct net income for that year. The resulting figures are alleged by the government to be a reasonable approximation of what the defendant should have reported on his income tax returns for the years in question.

Because the "net worth method" of proving unreported income involves a comparison of the net worth of the defendant at

the beginning and at the end of a year, the result cannot be accepted as correct unless the beginning point, or the starting net worth, is reasonably accurate. The proof need not show the exact value of all assets owned by the defendant at the starting point; but the evidence in the case must establish beyond a reasonable doubt that all assets owned by the defendant at the start of each year were insufficient to account for the subsequent increases in his net worth, as shown by the evidence in the case. What this means is that the evidence in the case must establish beyond a reasonable doubt that the defendant's assets at the beginning of the year, plus his reported income for the taxable year, do not add up to an amount sufficient to account for the increases in his net worth, plus his nondeductible expenditures during that year.

Explanations or "leads" may be offered to the government by or on behalf of the defendant as to the source of his funds. If leads are reasonably susceptible of being checked, the government must investigate into the truth of the explanations. On the other hand, when relevant leads are not forthcoming, the government is not required to negate every conceivable source of nontaxable funds. Whether or not such leads were offered to the government and whether or not the government investigated the leads are matters for you the jury to determine, and can be considered by you in determining the accuracy of the starting net worth figures.

You are instructed that, to be reliable, statements made by the defendant concerning his opening net worth must be corroborated by substantial independent evidence, if they are capable of corroboration. It is not necessary for the government to corroborate defendant's statements concerning his cash on hand, since the taxpayer is the only one who would know the amount, but statements concerning verifiable assets, such as real estate, automobiles, or bank accounts, for example, must be corroborated. Corroboration can be accomplished by substantiating the opening net worth directly or by independent evidence concerning defendant's conduct during the prosecution period, such as evidence of substantial expenditures and investments.

The burden is always upon the government to establish beyond a reasonable doubt that any amount reflected in the defendant's increased net worth, plus nondeductible expenditures, was from taxable, rather than nontaxable sources. In this connection, the jury will bear in mind that the federal income tax is levied upon income derived from a business, compensation for personal services of every kind and in whatever form paid; and also on income from interests, dividends, gains, profits, and the like.

You are instructed that amounts received by the defendant upon the sale of assets are not taxable unless that defendant received a gain; in other words, that the amounts received are greater than the defendant's basis in the assets. The defendant's basis in any particular assets depends upon how that particular asset was acquired. If the defendant purchased that particular asset in question, his basis is the amount paid for the asset. If the defendant acquired a particular asset or assets by gift, his basis is the same basis as that held by the person who gave the asset or assets to him. The basis of an asset aquired by inheritance from a decedent is the asset's fair market value as of the date of death. A taxpayer must report as income the fair market value of property received as income. If he fails to report the fair market value of an asset as income, he can not later claim the fair market value as his basis. Instead, his basis would be zero.

The First Amendment of the United States Constitution guarantees to every individual the freedom to exercise the religion of his choice. The sincerity of the defendant's religious beliefs is not an issue in this trial, and you should not consider in reaching your verdict the defendant's religious beliefs or how he exercises them.

The protection provided to religion by the First Amendment is not, however, absolute. The laws of this country, including the tax laws, apply to everyone, regardless of their religious beliefs or their membership in a religious order.

The federal income tax is levied on income received by ministers. When an individual provides ministerial services as his

trade or business, controls the money he receives in that business, and receives no separate salary, the income of that business is taxable to the minister. Voluntary contributions, when received by the minister, are income to him. Payments made to a minister as compensation for his services also constitute income to him. If money is given to a minister for religious purposes, any money used instead for the personal benefit of the minister becomes taxable income to him.

The law provides that funds or property received from certain sources do not constitute taxable income. Since no income tax is levied on such funds or property, they are not properly reported as income. Such nontaxable funds or property includes such items as gifts, inheritances, the proceeds of life insurance policies, loans and other miscellaneous items.

It is for you, the jury, to decide whether certain funds are taxable or nontaxable to the defendant. In determining whether a payment of money or property to the defendant is a nontaxable gift, you should look to the intent of the parties at the time the payment was made, particularly the intent of the person making the payment. Such payments are gifts if they proceed from a detached and disinterested generosity, out of affection, respect, admiration, charity, or like impulses. In making this determination, however, you must look at all the facts and circumstances in this case. The characterization given to a certain payment by either the defendant or the person making the payment is not conclusive. Rather, you the members of the jury, must make an objective inquiry as to whether a certain payment is a gift. You should look at the terms and substance of any request made by the defendant for the funds. In addition, you may take into account the following factors:

1. A payments is not a gift if it is made to compensate the defendant for his services. In this connection, you should consider how the defendant made his living.

2. A payment is not a gift if the person making the payment expects to receive anything in return for it. A payment would

not be a gift if it was made with the expectation that it would allow the defendant to remain in business.

3. A payment is not a gift to the defendant if it is made with the expectation that it will be used to further the religious or ministerial activities of the defendant.

4. A payment is not a gift if the person making the payment felt he had a duty or obligation to make the payment.

5. A payment is not a gift if the person making the payment did so out of fear or intimidation.

This is not a complete listing of all the factors you should consider. You should take into account all of the facts and circumstances of this case in determining whether any payment was a gift.

It is not necessary that income be received directly by the taxpayer. Income is taxed to the person who earns it, regardless of what arrangement he makes to divert payment of it elsewhere.

The burden is always on the government to prove beyond a reasonable doubt that the defendant had a tax liability for the years 1976, 1977, 1978 and 1979. In meeting this burden, the government must take into account those deductions to which the defendant is entitled, that it can calculate without his assistance. The defendant may assert additional deductions for the purpose of reducing or negating his tax liability.

The attempt to evade or defeat the tax must be a willful attempt; that is to say, it must be an attempt made voluntarily and intentionally, and with the specific intent to keep from the government a tax imposed by the income tax laws which it was the legal duty of the defendant to pay the government and which the defendant knew it was his legal duty to pay. In other words, the attempt must be made with the bad purpose of willfully seeking to defraud the government of some substantial amount of income tax lawfully due from the defendant.

The question of intent is a matter for you, as jurors, to determine. Intent is a state of mind. It is not possible to look into a man's mind to see what went on at a given time in the past. The only way to arrive at the intention of the defendant in this case is for you to take into consideration all of the facts and circumstances shown by the evidence, including the exhibits, and determine from all that evidence whether it was the intention of the defendant at the time in question to evade his income taxes.

Direct proof of intent is not necessary. A careful and intelligent consideration of the facts and circumstances shown by the evidence in any case enables one to infer what another's intentions were in doing or not doing things. With the knowledge of indefinite acts, you may draw definite, logical conclusions. We are, in our daily affairs, continuously called upon to decide from the acts of others what another's intentions or purposes are, and experience has taught that frequently actions speak more clearly than spoken or written words. Intent may be inferred from acts, and such inference may arise from a combination of acts, although each act standing by itself may seem unimportant. Thus, intent is a question of fact to be determined from all the evidence.

On the question of intent, you may consider certain facts and circumstances as pointing to a specific intent to evade tax, if you find such facts and circumstances to exist in this case. There are general illustrations: concealment of sources of income; failure to maintain adequate and accurate records of income and expenses; handling of financial affairs in a manner so as to avoid making the usual records; failure to report a substantial amount of income; surreptitious use of currency; concealment of the ownership or use of assets; and any other conduct from which you may infer an intent to evade tax. These are not meant to imply that the defendant did engage in any such conduct. It is for you to determine whether or not he did.

It is not necessary for you to conclude that the defendant's only motive for any such conduct was a desire to evade his

income taxes. Even if you find that a tax fraud motive played only a part in such conduct, then the requirement that the prosecution establish a willful attempt has been satisfied, even though such conduct might also serve some other purpose.

If a person, in good faith, believes that he has paid all the taxes he owes, he cannot be guilty of criminal intent to evade the tax. But if a person acts without reasonable ground for belief that his conduct is lawful, it is for the jury to decide whether he acted in good faith, or whether he willfully intended to evade the tax. This issue of intent, as to whether the defendant willfully attempted to evade or defeat the tax, is one which the jury must determine from a consideration of all the evidence in the case bearing on the defendant's state of mind.

The evidence has shown that the defendant did not prepare the tax returns in question and that it was prepared for him by an accountant who held himself out as one qualified to prepare federal income tax returns for others.

If the defendant provided the accountant with full information with relation to his taxable income and expenses during the year, and that the defendant then adopted, signed, and filed the tax returns as prepared by the accountant without having reason to believe that it was not correct, then you will find the defendant not guilty.

If on the other hand you find beyond a reasonable doubt that the defendant did not provide full and complete information to the accountant, or that he knew that the return as prepared by the accountant was not correct and substantially understated the tax liability of defendant, then you are not required to find the defendant not guilty simply because he did not prepare the return himself but rather had it prepared for him by another.

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

I caution you, members of the Jury, that you are here to determine the guilt or innocence of the accused from the evidence in the case. The defendant is not on trial for any act or conduct or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a defendant in this case.

Also, the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court or judge, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors, to consult with one another, and to deliberate in an effort to reach agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans, You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in court. A form of verdict has been prepared for your convenience.

You will take the verdict form to the jury room and when you have reached a unanimous agreement as to your verdict, you will have your foreman fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreman or forewoman, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.